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No. 88-1174

In the Supreme Court of the United States

October Term, 1988

THE HONORABLE PAUL A. SIMMONS, United States District Judge for the Western District of Pennsylvania
Pro Se Petitioner,

v.

JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITON

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COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether this Court should review the Third Circuit's issuance of a writ of mandamus compelling a district court judge (the petitioner herein) to vacate (a) unsubstantiated findings impugning the integrity of counsel and (b) other substantive, "non-housekeeping" orders, all of which were made or entered after said judge had acknowledged that his impartiality could reasonably be questioned and had repeatedly announced his intention to recuse himself.

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COUNTERSTATEMENT OF THE CASE

The "Statement of the Case" set forth in the Petition does not comply with this Court's Rule 21.1(g)[1], which calls for a "concise statement . . . containing the facts material to the consideration of the questions presented". It is so replete with argument that it is difficult to distinguish between the "Statement of the Case" and the following section of the Petition entitled "Reasons for Granting the Writ", in which argument is permitted.

Moreover, petitioner's "Statement of the Case" contains scores of so-called facts which are anything but "true and undisputed". Among other things, petitioner repeats the numerous unfounded allegations about respondents Robert J. Cindrich, Esquire and Douglas A. Campbell, Esquire which precipitated the filing of the petition for writ of mandamus in the court below. With regard to these allegations, the Third Circuit observed, "[W]e have examined the record and note that we can find no justification for the district judge's disparaging statements about the petitioners, which he repeats in his papers presented to this Court". *Moody v. Simmons,* 858 F.2d. 137, 144 (3d Cir. 1988). Appendix to Petition (hereinafter "App.") at 21a.

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[1]Similarly, the section of the Petition entitled "The Parties" is contrary to Rule 21.1(b). As petitioner correctly notes at page ii, the caption of the case in this Court contains the names of all of the parties to the proceeding below. The remaining five pages of that section of the Petition are not only superfluous, but also contain improper argument and numerous inaccurate or misleading statements concerning the parties and their respective roles in this matter.

Pursuant to Rule 28.1, none of the respondents on whose behalf this Brief in Opposition is filed is a corporation.

To respond to all of the inaccurate statements and omissions contained in petitioner's "Statement of the Case" would require that this brief be extended beyond its allowed length. Accordingly, without being taken to acquiesce in those assertions, respondents incorporate herein by reference the facts as set forth in the Third Circuit's opinion.

SUMMARY OF ARGUMENT

None of the considerations governing review on certiorari, as set forth in this Court's rules, supports the granting of the requested writ.

The issue presented to and decided by the Third Circuit was not, as petitioner erroneously suggests, whether the underlying bankruptcy case should be converted from a Chapter 11 to a Chapter 7. Rather, the issue before that court was whether substantive actions taken by a district court judge—after he had acknowledged that his impartiality could reasonably be questioned and had repeatedly announced his intention to recuse himself—should be set aside.

The Third Circuit's holding is not in conflict with any of the cases cited in the Petition, nor with any other cases of which respondents are aware. Because there are no other special and important reasons to review the decision of the court below, the Petition should be denied.

ARGUMENT

I. THE INSTANT CASE IS UNWORTHY OF REVIEW BY THIS COURT.

The Third Circuit's decision in this case is consistent with established law and does not present any questions

the resolution of which would have immediate importance beyond the particular facts and parties involved. Accordingly, no purpose would be served by review in this Court.

A. The Third Circuit's opinion does not conflict with any pertinent decisions of this Court or other courts of appeal.

Much of the Petition is based on the erroneous assumption that the mandamus proceeding below was, in reality, a collateral attack on petitioner's so-called "conversion order". This clearly was not the case.

The Third Circuit was not asked to and did not address whether the underlying bankruptcy case should be converted from a Chapter 11 to a Chapter 7. The issue with which the Third Circuit properly concerned itself was whether *any* non-ministerial actions should have been taken after petitioner determined that circumstances necessitated recusal. Deferring to petitioner's finding that recusal was required, the Third Circuit correctly held that petitioner should have recused himself at that time—not two months later, after issuing orders and findings far too substantial to be considered mere "housekeeping". App. 17a-19a.

Petitioner's repeated assertions to the contrary notwithstanding, the Third Circuit's opinion does not conflict with any applicable decisions issued by this Court or other courts of appeal. In fact, only two of the cases cited in the Petition—*United States v. Murphy,* 768 F.2d 1518 (7th Cir. 1985), *cert. denied,* 475 U.S. 1012 (1986), and *Liljeberg v. Health Services Acquisition Corp.,* 108 S.Ct. 2194 (1988)—even address the subject of recusal under 28 U.S.C. §455(a). Neither of these cases is contrary to the case *sub judice.*

United States v. Murphy—a criminal case in which the defendant waited until after he had been convicted and sentenced to file a Section 455(a) motion for recusal—is so obviously distinguishable as to render petitioner's assertion of "conflict" untenable. Unlike Murphy, who argued that the judge's actions *prior* to being asked to recuse should be nullified, the mandamus petitioners below sought only to vacate actions taken *after* the judge himself acknowledged that recusal was required.

In *Liljeberg,* this Court affirmed the decision of the court of appeals, which vacated a judgment on the ground that a judge should have disqualified himself when he first became aware of circumstances creating an appearance of partiality. Noting that 28 U.S.C. §455(a) "neither prescribes nor prohibits any particular remedy for a violation of [a judge's duty to disqualify himself]", this Court explained:

> Congress has wisely delegated to the judiciary the task of fashioning remedies that will best serve the purpose of the legislation. In considering whether a remedy is appropriate, we do well to bear in mind that in many cases—and this is such an example—the Court of Appeals is in a better position to evaluate the significance of a violation than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration.

108 S.Ct. at 2203.

Perhaps the most baseless argument advanced by petitioner is that the Third Circuit in *Polaroid Corp. v. Disney,* 862 F.2d 987 (3d Cir. 1988), "has already reversed the law in the case at bar, in less than six weeks . . . " Petition at 19-20. In *Polaroid,* the Third Circuit affirmed in part and reversed in part a district court's denial of a preliminary

injunction, holding that the target of a corporate takeover attempt had satisfied the requirements for injunctive relief on its misrepresentation claim under §14(e) of the Williams Act, but did not have standing to assert a violation of the Security and Exchange Commission's All Holders Rule. *Id.* at 989-90. That decision obviously does not reverse, conflict with, or have any bearing whatsoever on the decision in the instant case.

Petitioner seeks to find conflicts where none in fact exists. Certiorari should be denied because the Third Circuit's opinion is wholly consistent with this Court's decision in *Liljeberg* and does not conflict with any pertinent decisions of the Third Circuit or other courts of appeal.

B. There are no other special and important reasons for granting a review on writ of certiorari.

The matter *sub judice* stems from an unfortunate, but not unprecedented, clash between a district court judge and attorneys who appeared before him. The Third Circuit's issuance of a writ of mandamus—compelling that judge to vacate unsupported remarks impugning the integrity of counsel and other substantive actions, all of which were made or taken after the judge himself had repeatedly acknowledged that his impartiality could reasonably be questioned—was entirely proper and has no significant ramifications beyond the immediate interests of the parties involved.

The final "reason" which petitioner advances for granting the requested writ is that is it unethical for the law firm of Mansmann Cindrich & Titus (formerly Mansmann Cindrich & Huber) to be involved in this case—or in any other bankruptcy-related case pending in the Third Circuit Court of Appeals or any district courts or bankruptcy

courts within said Circuit—because J. Jerome Mansmann, Esquire, a partner in the firm, is married to Third Circuit Judge Carol Los Mansmann. Petitioner further suggests that all of the other judges on the Third Circuit should have disqualified themselves from ruling on the mandamus petition because of Judge Mansmann's alleged "direct financial involvement in this case, suggested by her husband's law firm's admitted vested interest[2] in a potential twelve million dollar legal fee." Petition at 26-27.

There is no basis for either assertion. No statute, rule of court, code of judicial conduct, or rule of professional conduct prohibits spouses of federal circuit or district court judges from appearing as counsel in bankruptcy or bankruptcy-related cases. Nor is there any such authority which requires the recusal of an entire circuit court simply because the spouse of one member of that court is involved in a case.

When the district court action arose in 1983, the firm of Mansmann Cindrich & Huber sought from the Honorable Ruggero J. Aldisert (then Chief Judge of the Third Circuit Court of Appeals and former chairman of the Advisory Committee on Bankruptcy Rules) an opinion whether the firm could properly serve as counsel in view of Bankruptcy Rule 5002, which at that time prohibited the appointment or employment of "a relative of any judge of

[2]The "admitted vested interest" to which petitioner refers is nothing more than the court approved contingent fee arrangement. Although a contingent fee agreement gives a lawyer a financial interest in the outcome of a case, that interest is not "adverse to the estate" within the meaning of 11 U.S.C. §327, as petitioner wrongly suggests at page 20 of the Petition. On the contrary, there is nothing improper about a contingent fee arrangement. *See, e.g.*, Model Rules of Professional Conduct Rule 1.5(c) (1983); Model Code of Professional Responsibility DR 5-103(A)(2), EC 2-20 and EC 5-7 (1979). (Pertinent portions of these provisions are set forth in the Appendix to this Brief at A-2-A-4.)

the court making the appointment or approving the employment . . . "

In response, Chief Judge Aldisert forwarded to Mansmann Cindrich & Huber a copy of an opinion letter which he had recently sent to another law firm dealing with the same question. After reviewing that letter, Mansmann Cindrich & Huber was fully satisfied that it was not barred from serving as counsel.[3]

Although the situation which has developed in this case is regrettable, no issues are presented which are of such general interest or importance as would warrant review by this Court.

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[3]Any doubt that may have existed about the issue was put to rest in 1985, when Bankruptcy Rule 5002 was amended to prohibit only the appointment or employment of an individual who "is a relative of *the bankruptcy judge* making the appointment" (rather than "a relative of any judge of the court making the appointment"). (Bankruptcy Rule 5002, and Bankruptcy Rule 5002(a) as amended April 29, 1985, are set forth in the Appendix to this Brief at A-1.)

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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APPENDIX

I. Bankruptcy Rule 5002 (1983), 11 U.S.C.

No person may be appointed as a trustee or examiner or be employed as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §327 or §1103 of the Code if (1) the person is a relative of any judge of the court making the appointment or approving the employment or (2) the person is or has been so connected with any judge of the court making the appointment or approving the employment as to render such appointment or employment improper. Whenever under this rule a person is ineligible for appointment or employment, the person's firm, partnership, corporation, or any other form of business association or relationship, and all members, associates and professional employees thereof are also ineligible for appointment or employment.

II. Bankruptcy Rule 5002(a) (eff. August 1, 1985), 11 U.S.C.

(a) Appointment of Relatives Prohibited. No individual may be appointed as a trustee or examiner or be employes as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §327 or §1103 of the Code if the individual is a relative of the bankruptcy judge making the appointment or approving the employment. Whenever under this subdivision an individual is ineligible for appointment or employment, the individual's firm, partnership, corporation, or any other form of business association or relationship, and all members,

associates and professional employees thereof are also ineligible for appointment or employment.

III. Model Code of Professional Responsibility (1979)

DR 5-103 Avoiding Acquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

* * *

(2) Contract with a client for a reasonable contingent fee in a civil case.

EC 2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who,

after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same considerations as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fees.

EC 5-7 The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those

instances where the arrangement will be beneficial to the client.

IV. Model Rules of Professional Conduct (1983)

RULE 1.5 FEES

* * *

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.